No. 73-1617

In the Supreme Court of the United States

October Term, 1973

United States of America, petitioner

v.

[illegible] DEPARTMENT [illegible], et al.

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA

v.

MARTIN DEWALT MAZURIE, ET AL.

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF CERTIORARI OUT OF TIME UNDER RULE 22(2) OF THE RULES OF THIS COURT

The Solicitor General, on behalf of the United States, moves for leave to file a petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit out of time, under Rule 22(2) of the Rules of this Court.

1. Through an error of the Land and Natural Resources Division of the Department of Justice (the Division which has responsibility for this case but which normally handles civil cases in which there is a 90-day period after judgment within which to petition for a writ of certiorari), this decision, declaring portions of two federal statutes unconstitutional, was not brought to the attention of the Office of the Solicitor General until December 12, 1973, 35 days

after the court of appeals entered its judgment (on November 8, 1973). As explained in the attached petition, this decision is of great importance to numerous Indians living on reservations located in the Tenth Circuit, since its effect is to abolish all congressional or tribal regulation of liquor sales on fee lands within the reservations.

2. The 30-day time limit prescribed in Rule 22(2) of the Rules of this Court is "not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Schacht* v. *United States,* 398 U.S. 58, 64. This is an appropriate case for such a relaxation. While it is a criminal case in which each respondent was fined $100, it is more fundamentally a regulatory case in which the ultimate issue is whether there is to be any congressional or tribal control of liquor sales on fee lands in Indian country. The many reservation Indians whose welfare would be adversely affected by the court of appeals' decision had no control of the conduct of this litigation, and the government's error in not complying with Rule 22(2) was entirely inadvertent.

The United States therefore moves for leave to file the attached petition for a writ of certiorari out of time in this case.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA, PETITIONER
v.
MARTIN DEWALT MAZURIE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The district court did not issue an opinion. Its judgment of conviction with general findings (App. C, *infra*) is not reported.

JURISDICTION

The judgments of the court of appeals (App. B1, B2, and B3, *infra*) were entered on November 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1154, which makes it a criminal offense to introduce spiritous liquor into Indian country, but excludes from the definition of Indian country "fee-patented lands in non-Indian communities", is unconstitutional as applied to respondents because the term "non-Indian community" is "indefinite and vague".

2. Whether 18 U.S.C. 1161, which permits sales of spiritous liquor in Indian country if in accordance with state law and "an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the federal register", is an unconstitutional delegation of authority by Congress to the Indian tribes.

3. Whether Congress has the authority, under Article 1, Section 8, Clause 3, and other provisions of the Constitution of the United States, to regulate and control the introduction of alcoholic beverages into Indian country, as defined by 18 U.S.C. 1151 and 1154.

STATUTES INVOLVED

18 U.S.C. 1151 provides in pertinent part:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation * * *

18 U.S.C. 1154 provides in pertinent part:

> (a) * * * whoever introduces or attempts to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.
>
> * * * * *
>
> (c) The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

18 U.S.C. 1161 provides:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the In-

terior, and published in the Federal Register. (Added Aug. 15, 1953, ch. 502, § 2, 67 Stat. 586.)

STATEMENT

1. The Wind River Reservation is a major Indian reservation established by treaty in 1868 (Treaty of July 3, 1868, 15 Stat. 673) located in central Wyoming and occupied jointly by the Arapahoe and Shoshone Indian Tribes (the Wind River Tribes). See *Shoshone Tribe* v. *United States*, 299 U.S. 476. As a result of various allotment Acts, there are scatterings of non-Indian held land within the reservation,[1] as is the case with many reservations.[2] Such non-Indian held lands "within the limits of any Indian reservation" are within the definition of "Indian country" in 18 U.S.C. 1151.

Prior to 1953 federal legislation generally prohibited sales of liquor to reservation Indians and the introduction of liquor into Indian country. See 18 U.S.C. 1155. In 1953, however, Congress passed a local option Act which allowed Indian tribes, with the approval of the Secretary of the Interior, to permit the sale of liquor within Indian country (Act of August 15, 1953, Ch. 502, Sec. 2, 67 Stat. 586, 18 U.S.C. 1161). In 1953 the Wind River Tribes adopted an ordinance permitting the sale of liquor within the Reservation if done in accordance with Wyoming law. In February 1971 the Wind River Tribes passed a new ordinance

[1] The Bureau of Indian Affairs informs us that of the 2,288,500 acres within the Reservation, 403,422 are owned by non-Indians.

[2] See *Seymour* v. *Superintendent*, 368 U.S. 351; *Mattz* v. *Arnett*, 412 U.S. 481.

(Ordinance No. 26), which was approved by the Secretary of the Interior and published in the Federal Register, prohibiting the sale of liquor within the Indian country under their jurisdiction unless the seller has obtained a tribal license as well as a state license. App. A, *infra*, p. 19. See also stipulation, R. 74.[3]

2. The Blue Bull is a bar and liquor store located on land owned by Blue Bull, Inc., a Wyoming corporation. The corporation is owned by respondent Margaret Mazurie, and the bar is managed by her husband, Martin Mazurie (R. 74–75). The Mazuries operated the bar prior to the enactment of the 1971 ordinance and continued operating it hereafter (R. 75–76). Mr. Mazurie testified that the bar served both Indians and non-Indians, that there were sometimes "disturbances" at the bar; and that if the disturbance was by a non-Indian he would call the sheriff's office, if by an Indian he would call the tribal police at Fort Washakie (Tr 113–114).[4]

On April 3, 1972, an officer of the Bureau of Indian Affairs notified the Mazuries that they would be subject to criminal charges if they did not apply for a tribal license (R. 75, Tr. 101–103). On April 12, 1972, they applied for a tribal license to sell liquor on the Reservation (R. 75, 56–58). The tribes held a public hearing on the application on April 17, 1972, which Mr. Mazurie and the Mazuries' lawyer attended (R. 67–73).

[3] "R" refers to the one-volume Record on Appeal, a copy of which we are lodging with the Clerk.

[4] "Tr." refers to the one-volume Transcript of Trial Proceeding, a copy of which we are lodging with the Clerk.

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At that hearing one witness testified that the people at the bar had been "singing all night, shooting guns over there and meeting" and protested granting the license (R. 67). Another witness testified that there had been twelve killings on the reservation, the majority of which had to do with alcohol (R. 67). The Chairman of the Council termed the bar "a public nuisance" (R. 68). The Chairman of the Tribes' housing committee testified that drunks from the bar wander into a nearby Indian housing development at all hours of the night disturbing elderly members "who would like to be left alone and they can't get their proper rest" (R. 68). There was also a discussion of the problem of Indian minors being permitted at the bar, which Mr. Mazurie apparently admitted to be a problem (Tr. 71–72). Respondents' counsel spoke in favor of the bar, arguing that the Mazuries would do better in the future, that other bars had not been closed, and that the license fee to the tribes for the bar would be from $300 to $1500 per year (R. 68–70). At the end of the hearing the application was denied (R. 75).

For approximately three weeks following the denial of the tribal liquor license, the Blue Bull was closed. It thereafter reopened and continued in operation until June 13, 1973, when federal officers seized its alcoholic beverages. (See R. 30, Tr. 115–116).

3. This prosecution was initiated on June 29, 1972, when the United States attorney filed a criminal information in the United States District Court for the District of Wyoming charging that "within the exterior boundaries of the Wind River Indian Reservation and within the Indian Country [respondents] unlawfully, wilfully and knowingly did introduce * * * into the Indian Country malt and spirituous and vinous liquor and beer and ale and wine and ardent and intoxicating liquor" in violation of 18 U.S.C. 1154 (R. 1).[5]

The case was tried before a judge alone. The parties stipulated as to the ownership and management of the bar, its location on fee land within the Reservation, the application for and denial of a tribal license, and that witnesses would testify that they had purchased liquor at the bar after the denial of a license (R. 74–77). The evidence at trial showed that the Blue Bull is located on a ten-acre lot about three quarters of a mile from Fort Washakie, Wyoming, the central Indian community of the Reservation, that it is about 25 miles from Riverton, Wyoming, and 15 miles from Lander, Wyoming, the closest non-Indian communities, and that it is not located on a right-of-way.[6] There was no evidence that the Blue Bull was located in a non-Indian community. Mr Mazurie testified "we are kind of out there by ourselves, you know" (Tr. 114).

On the basis of this record, the district judge, who was also personally familiar with the area, found that

[5] The information also charged Bonnie Ellen Velasquez with the same offense, but the court dismissed the charge as to her on the ground that she, unlike respondents, did not knowingly violate the statute. Tr. 136.

[6] 18 U.S.C. 1154 excludes rights-of-way from the definition of "Indian country" for purposes of liquor regulation—thus allowing liquor to be transported on rights-of-way through reservations without tribal regulation.

the Blue Bull was located in Indian country as defined in 18 U.S.C. 1154 (App. C). The court held that Tribal Ordinance 26 was valid and that "The said defendants in dispensing intoxicants from the Blue Bull, Inc., absent a license from the Joint Business Council of the Shoshane and Arapohoe Tribes violated Section 1154 of Title 18 U.S.C." R. 29–32. The respondents were convicted and each was fined $100.

The court of appeals reversed (App. A). It did not find that respondents were selling liquor in a non-Indian Community, but instead held:

> that the terminology of "non-Indian community" is not capable of sufficiently precise definition to serve as an element of the crime herein considered, aside from other factors or elements with similar infirmities. The statute is thus fatally defective by reason of this indefinite and vague terminology.

As another basis for reversal, the court held that the provisions of 18 U.S.C. 1161, which permit the Indian tribes to set the criteria under which alcohol may be introduced into Indian country under their jurisdiction by adopting an ordinance so providing,[7] constitute an improper congressional delegation of authority to the Indian tribes (App. A, *infra,* pp. 26–27).

Finally, the court of appeals suggested[8] that Congress does not have the authority to regulate and control the sale of alcohol to Indians on fee-patented land owned by non-Indians within Indian reservations,

[7] The ordinance must be certified by the Secretary of the Interior and published in the Federal Register (18 U.S.C. 1161).

[8] See App. A, *infra*, p. 26.

stating: "It is obvious that the authority of Congress under the Constitution to regulate commerce with Indian Tribes is broad, but it cannot encompass the relationships here concerned" (App. A, *infra,* p. 27).

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals has seriously impaired, indeed has effectively abolished in a crucial area of the country, the congressional scheme for the control of alcoholic beverages on Indian reservations. The reservations are dotted with privately owned land, and, under this decision, anyone on such land who can obtain a state liquor license can operate a bar within the reservation free from regulation by the tribe or the federal government. This clearly was not the intent of Congress, which, with only two narrow exceptions (passage on rights-of-ways and sales in non-Indian communities) specifically prohibited the introduction of liquor to Indian reservations unless authorized by tribal ordinance.

Regulation of the sale of alcohol within reservation boundaries is of extreme importance to the Indian tribes. While intoxication is a problem throughout the country, it is a particularly serious problem for Indians. A recent study by the National Institutes of Health shows that the alcoholism death rate for Indians during the past few years has been approximately five times the rate for the country as a whole.[9] Of equal significance, the Bureau of Indian Affairs informs us that more than 95 percent of all crimes on

[9] National Institutes of Health, *Suicide, Homicide and Alcoholism among American Indians* (1973), pp. 25–31.

Indian reservations are committeed by persons under the influence of alcohol.

A substantial number of the Indian reservations in the United States are within the jurisdiction of the Tenth Circuit. Of the 25 reservations in that jurisdiction, only 8 permit the sale of alcohol within reservation boundaries (except, as the law requires, in non-Indian communities). The effect of the court of appeals' decision is thus to overturn the congressionally authorized decision of a majority of the tribes in the Circuit against permitting alcohol on their reservations, and to overturn the decision of others to regulate its introduction. Moreover, the court of appeals has not only held the present statute invalid for vagueness; its opinion would apparently also preclude any future legislative solution because it declares that Congress and the tribes are each without authority to regulate the sale of alcohol on privately owned land within reservations. As we shall explain, these holdings are contrary to decisions of this Court and of other courts of appeals. In light of the serious adverse impact of these holdings on reservation Indians, review by this Court is warranted.

2. The court of appeals' ruling that 18 U.S.C. 1154 (c) is void on its face for vagueness is inconsistent with this Court's decision in *United States* v *National Dairy Corp.*, 372 U.S. 29, 32–33. See, also, *Cox* v. *Louisiana*, 379 U.S. 559, 562; *Coats* v. *City of Cincinnati*, 402 U.S. 611, 619–621 (dissenting opinion).[10] These decisions make clear that in a case not involving

[10] See, also, *United States* v. *Raines*, 362 U.S. 17, 22.

First Amendment rights a statute should not be declared facially void for vagueness when in the case before the court it gives adequate warning of the conduct proscribed. As this Court said in *National Dairy Corporation, supra*, 372 U.S. at 32–33:

> The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. *E.g., Jordan* v. *De George*, 341 U.S. 223, 231 (1951), and *United States* v. *Petrillo*, 332 U.S. 1, 7 (1947). Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation. *E.g., United States* v. *Rumely*, 345 U.S. 41, 47 (1953); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); see *Screws* v. *United States*, 325 U.S. 91 (1945).
>
> Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged. *Robinson* v. *United States*, 324 U.S. 282 (1945).

The basic definition of Indian country in 18 U.S.C. 1151 and 1154 is clear and not in dispute. The concern of the court below as to vagueness was limited to the exception provided by 18 U.S.C. 1154(c) that for purposes of Section 1154 "Indian country * * * does not include fee-patented lands in non-Indian

communities." The exception does not permit sale of liquor on all patented lands within Indian reservations but only on such lands in non-Indian communities. Moreover, as the court of appeals correctly noted, the exception does not refer to "non-communities" (App A, *infra,* p. 22). Thus to fall within the exception the sale must be in a non-Indian community. As we have shown (see Statement, *supra,* pp. 9–10), and as the trial court found, respondents' bar was clearly not in a non-Indian community. It may be questionable whether it was in no community or in the Fort Washakie Indian community. But there is no basis for believing that it was in a "non-Indian community," in any realistic sense of these words. Moreover, the defendants had no uncertainty as to the Tribe's and the government's interpretation of the statute. After being notified by an officer of the Bureau of Indian Affairs of the statute's applicability to them, they applied for a permit and were refused it for cause; they then complied with, and only later chose to violate, the statute. And Mr. Mazurie's own testimony (p 9, *supra*) showed that he knew his bar was not in a non-Indian community. There is no reason to believe that in this case or, indeed, in the majority of cases the people affected by the statute will have substantial doubt as to whether they can legitimately claim to be in a non-Indian community.[11]

[11] The phrase "dependent Indian communities" used in 18 U.S.C. 1151 to define Indian country *outside* a reservation has not presented the Tenth Circuit with similar problems. See *United States* v. *Martine*, 442 F. 2d 1022.

3. The decision below also conflicts with the decision of the court of appeals for the Eighth Circuit in *Buster* v. *Wright,* 135 Fed. 947, 950, appeal dismissed, 203 U.S. 599. See, also, *Iron Crow* v. *Oglala Sioux Tribe,* 231 F. 2d 89, 98–99 (C.A. 8). In *Buster* v. *Wright,* the Eighth Circuit ruled that Indian tribes have the inherent authority to license and tax non-Indians conducting business on fee patented land within the exterior boundaries of their reservations. The court specifically rejected the proposition now adopted by the Tenth Circuit that the grant of patents to the land ended the Tribe's governmental authority and held that that authority continues except as limited by Congress. 135 Fed. at 952. Indeed in *Buster* v. *Wright* the tribal regulation at issue applied to all trade, not just liquor, and there was no Act of Congress specifically authorizing the regulation. Here, by contrast, Congress has itself provided the prohibition and specifically established compliance with tribal regulations as a defense, with the requirement that the tribal ordinance be approved by the Secretary of the Interior, as was done (R. 74).

In holding that Congress exceeded its authority in authorizing such regulation by an Indian tribe, the court below characterized the tribe as "a private, voluntary organization, which is obviously not a governmental agency" (App. A, *infra,* p. 27) and which cannot exercise authority over non-members or over land it does not own (*ibid.*). This characterization, however, ignores the consistent line of cases from *Worcester* v. *Georgia,* 6 Pet. 515, to *McClanahan* v. *Arizona State*

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Tax Commission, 411 U.S. 164, holding that Indian tribes are governmental units which properly exercise governmental powers within their reservation boundaries. Accordingly, the limited authority vested in the tribes under the present statutory scheme (to grant exceptions to the congressional prohibition within the boundaries of their own reservations) is entirely proper, especially when adjudged, as it should be, against the background of the Indian sovereignty doctrine on which such decisions as *Buster* v. *Wright* were based. See *McClanahan, supra,* 411 U.S. at 169–172.

4. The court below also suggested (App. A, *infra,* p 27) that Congress itself lacks authority to regulate sales of liquor on privately held lands within Indian reservations. This Court has held to the contrary. *Perrin* v. *United States,* 232 U.S. 478.

Ample power for such regulation is conferred on Congress by Article I, Section 8 of the Constitution, which authorizes it to regulate commerce "among the several States, and with the Indian Tribes" and to enact all laws "necessary and proper for carrying into execution * * * all * * * Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," including the treaty power and the proprietary powers of Article IV, Section 3. See *Perrin, supra,* 232 U.S. at 482–485; see also *Worcester* v. *Georgia, supra,* 6 Pet. 515 at 559; *Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
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DECEMBER 1973.

APPENDIX A

United States Court of Appeals, Tenth Circuit

SEPTEMBER 1973 TERM

Nos. 73-1077, 73-1078, 73-1079

UNITED STATES OF AMERICA, APPELLEE

v.

MARTIN DEWALT MAZURIE, MARGARET J. MAZURIE, AND THE BLUE BULL, INC., APPELLANTS

Appeal from the United States District Court for the District of Wyoming (D.C. No. 8570)

Before LEWIS, Chief Judge, SETH and HOLLOWAY, Circuit Judges

SETH, *Circuit Judge*

The appellants were prosecuted on an information charging them with the introduction of liquor into "Indian Country." They were tried by the court, found guilty of a violation of 18 U.S.C. § 1154, and have taken this appeal.

The prosecution was instituted because the defendants did not have a license for their tavern from the Arapahoe and Shoshone Indian Tribes (the Wind River Tribes), permitting the sale of liquor. The tavern of defendants where the charged offense took place is located on land owned in fee by them, but within the boundaries of the Wind River Indian Reservation. The business was licensed under the laws of

Wyoming by Fremont County, and had been so operating since 1954. The appellants are not Indians.

The Wind River Tribes in 1953 adopted a regulation which permitted the sale of liquor within the Reservation if it was done in accordance with Wyoming law with no additional requirements. In 1971, however, the Tribes adopted a new regulation which required persons in defendants' position to also obtain a license from the Tribes. The defendants at the time of the charged offenses did not have such a license, and this the Government asserts was contrary to 18 U.S.C. § 1161, which section in effect requires such a tribal license to avoid a violation of 18 U.S.C. § 1154 if the sale of liquor is in "Indian Country," and under "jurisdiction" of the Tribe, and not in a "non-Indian community" as the terms appear in 18 U.S.C. § 1154(c). Thus the issues on appeal relate to these exceptions or conditions provided in 18 U.S.C. § 1154(c); to the provisions for tribal licensing in 18 U.S.C. § 1161; and to the application of those provisions to a business on lands patented by the United States to defendants' predecessors in fee.

The Wind River Reservation covers a gross area of something more than one hundred townships and is roughly in the form of a square. Within the boundaries is the town of Riverton, Wyoming, and several small communities. About 4,500 Indians live on the Reservation, that is, persons who are enrolled by the Tribes as members. The Reservation is crossed by two or three principal highways. There are several hundred separate tracts of fee land within the boundaries which in total area would be roughly one-fifth of the Reservation. Some of these fee tracts consist of twenty or thirty contiguous sections or more, and some are just a few acres. The balance of the acreage consists of trust lands, some Indian allotments, and

large tracts of Government land. The Reservation is occupied by the Shoshone and Arapahoe Tribes who have beneficial title. See Shoshone Tribe v. United States, 299 U.S. 476.

The appellants' tavern is located within the exterior boundaries of the Reservation on a small tract of land patented in fee by the United States in 1954 under 24 Stat. 390 and 34 Stat. 182 to appellants' predecessors. The patent contains no restrictions as to the use to which the land may be put. The land is taxed by the State of Wyoming, and the state provides the usual public services for it. It is in a Fremont County School District which provides schools for the area, and on a county road.

There is no issue as to the presence of liquor at the tavern which was the incident on which the "introduction" count of the information was based.

There are several interrelated conditions and definitions, referred to above, which must be established under the several sections of the statute for there to be a violation. For example, the place where the sale took place must be in "Indian Country," under 18 U.S.C. §§ 1154 and 1161, but *not* on "fee-patented" land in "non-Indian communities." Also the sale must *not* be in "conformity" with state laws *and* tribal regulations of the Tribe "having jurisdiction" over the area of Indian country. 18 U.S.C. § 1161. These definitions or requirements must be examined as a part of the crime charged.

We are thus concerned with the elements of this crime, and not the frequently encountered question of whether state or federal *jurisdiction* exists over certain crimes which is determined by the place where they were committed. 18 U.S.C. §§ 1151, 1152, 1153. Instead the geographical-land status terms and the substance and effect of tribal regulations thus become part of the elements of a crime, and if not shown the act was a legal one.

The type of business engaged in by the appellants is what has now become a regulated retail business which has been legalized by the United States and licensed under the laws of the State of Wyoming. Thus the selling of liquor to Indians at a tavern licensed by the state is, of course, not a federal crime per se, but can become one under certain conditions, the definition of which, and the problem of proof of the existence of which, are hereinafter described.

The first consideration must be given to the term "non-Indian community" as used in 18 U.S.C. § 1154 (c). This subsection was added by the Act of May 24, 1949, § 27(b). See U.S. Code Cong. & Ad. News, 1949, p. 1248. The reported congressional history does not provide much help in arriving at the intended construction of the term.

18 U.S.C. § 1154 provides in part:

> (a) * * * [W]hoever introduces * * * any * * * spiritous, or vinous liquor, including beer, * * * into the Indian country, shall, * * * be fined * * *.
>
> * * * * *
>
> (c) The term 'Indian country' as used in this section does not include fee-patented land in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto. June 25, 1948, c. 645, 62 Stat. 758; May 24, 1949, c. 139, § 27, 63 Stat. 94.

18 U.S.C. § 1161 provides:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor

> to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register. (Added Aug. 15, 1953, ch. 502, § 2, 67 Stat. 586.)

The basic statute (18 U.S.C. § 1154) originally made it a crime to sell liquor to certain Indians at any location, or to introduce liquor into "Indian Country." By subsection (c), it was then provided that "Indian Country" as used in the section "* * * does not include fee-patented lands in non-Indian communities.* * *" Thus if it is assumed for the moment that the fee land in question is in "Indian Country," generally, the question whether the particular place was also in a "non-Indian community" must be resolved if it can be. If the tavern was in a "non-Indian community" in "Indian Country," no crime was committed. The statute does *not* refer to "Indian communities" nor to non-communities.

The proof in the record herein of this element of the crime is inconclusive and indefinite. It showed that the tavern was located from one-half to three-quarters of a mile from the Reservation headquarters at Fort Washakie where there were located about eight business places. In the twenty square mile area surrounding the agency, it was estimated there were 170 Indian families and forty-one non-Indian families. The witnesses called by the Government were unable to define any boundaries of Fort Washakie. Mr. Harris, Chairman of the Shoshone Business Council, testified that the place in issue was not an "Indian community." The Reservation Superintendent testified there were no community boundaries which could be defined, and

he could not testify that the location was in an Indian community. An examination of the record on this issue demonstrates that the inability of the witnesses to testify with specificity stems from the lack of any standards or any definition for the term. It was not clear to the witnesses what a "community" was, nor what was meant by "non-Indian." All that the proof shows was that the location was probably not in an Indian community; however, the statute refers only to "non-Indian communities."

The term "non-Indian community" could apply to towns such as Riverton, which is located within the exterior boundaries of the Wind River Reservation, and perhaps to other smaller settlements along the highways, but when the specific place here concerned is considered the problem is apparent. There is no standard provided as to what percentage of Indians or non-Indians is contemplated. Thus if a given area can be selected as a "community," the statute does not indicate that if there are more Indians than non-Indians, it becomes an Indian community, or what the "community" is if there are a greater or lesser comparative number of Indians. The Act also does not state who is an Indian. There are acts for other purposes which use twenty-five per cent Indian blood as the standard; others leave the test up to the Tribe concerned. Thus perhaps tribal membership is the test. However, if the twenty-five per cent test is used, individuals who are seventy-five per cent non-Indian could be counted to make up an "Indian" community, but in any event there is no guide as to this whatsoever.

It is also apparent that what constitutes a "community" for this purpose is not defined nor can it be clearly ascertained. In an area where the defendants' business was located, there were apparently some

few scattered houses, although the record is not clear, but the witnesses did not have any standard on which to base their testimony. As mentioned, the nearby Fort Washakie had no definable boundaries, if it was a community, and the witnesses thus could not testify whether the bar was in it or not. There was thus no proof as to whether it was in a community or not in one, or if in one, what kind. Again, the proof failed because the statute contains no reasonably ascertainable standards.

Under these indefinite and vague conditions, the business generally, or isolated transactions legal under state law, could be either a federal crime or perfectly legal. We must hold that the terminology of "non-Indian community" is not capable of sufficiently precise definition to serve as an element of the crime herein considered, aside from other factors or elements with similar infirmities. The statute is thus fatally defective by reason of this indefinite and vague terminology.

Vagueness in a non-First Amendment case has been considered by the Supreme Court in *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, and *Connally* v. *General Construction Co.*, 269 U.S. 385. Under these standards the provision must not require persons of usual intelligence to guess as to its meaning nor differ as to its application. The vagueness issue was fully explored by the First Circuit in *Gogueu* v. *Smith*, 471 F. 2d 88 (1st Cir.). The statute here concerned is an isolated one, and not part of a general regulatory plan. It was applied in the trial court, and here urged by the Government, as containing a requirement (being in a non-Indian community) to be demonstrated at trial by the defendants. The placing of such a burden on defendants was improper. *Grunewald* v. *United States*, 353 U.S. 391.

The Supreme Court in *Seymour* v. *Superintendent*, 368 U.S. 351, considered the question as to whether a

charge of burglary against an Indian could be prosecuted by state or federal authorities. Here again a crime covered by 18 U.S.C. § 1152 in Indian country (section 1151) was considered. The location where the crime took place was fixed, and it was on privately owned land, but the Court reaffirmed the broad interpretation of Indian country, and mentioned the problems under section 1152 if the law enforcement officials had to search the tract books to decide whether jurisdiction over a particular crime was in the state or the United States. See also the checkerboard land status cases, *Ellis* v. *Page*, 351 F. 2d 250 (10th Cir.); *Hilderbrand* v. *Taylor*, 327 F. 2d 205 (10th Cir.), and *Martinez* v. *Southern Ute Tribe*, 249 F. 2d 915 (10th Cir.). Under this record this problem of law enforcement is not serious as the officers have dual authority; however, this is not the type of crime, nor a crime committed by an Indian, which we are considering. There is no policy or need for a broad interpretation of "Indian Country," under these conditions. There is instead a fixed place of business, the crime charged is against non-Indians, and the question is whether additional licensing was required. We do not reach the question as to whether the definition of "Indian Country" in 18 U.S.C. § 1151 is applicable only to the ten major crimes, as defendant urges, or is applicable to other transactions, as the Government contends.

The issue is also raised on the fundamental question of the authority of the Government or of the Tribes to regulate the defendants' business in a way that *a failure to conform constitutes a crime*. As indicated above, we are concerned with a business operating at a fixed place and legal under Wyoming laws. This business would have also been legal, under the Government's theory, if defendants had a license from the Wind River Tribes. The failure to have such a license

thus resulted in this prosecution. The Government has thus delegated to the Tribes the unrestricted power to determine whether the operation of defendants' business constitutes a federal crime or not. Whatever regulation the Tribe adopts is enforced under the wording of the statute (18 U.S.C. § 1161), and any non-conformity therewith to whatever degree is a criminal offense.

If the Government has the power to regulate a business on the land it granted in fee without restrictions, which we doubt, it cannot delegate the power above described to the Tribes. There is no theory of sovereignty or governmental subdivision which would support such a delegation.

The Tribes have the usual powers of an owner of land, to the extent of such ownership, over those using their lands. This power is often confused with some elements of sovereignty when large tracts are involved, and when only the relationship between a Tribe and the Government is examined. The decisions relating to the sovereignty of certain tribes are in the context of relationships between a Tribe and the federal or state government. This relationship is influenced and derived from treaties, and relates to lands and taxes. See *United States* v. *Mason,* —— U.S. ——, 41 U.S.L.W. 4771; *McClanahan* v. *Arizona Tax Comm'n,* —— U.S. ——, 41 U.S.L.W. 4457; *Mescalero Apache Tribe* v. *Jones,* —— U.S. ——, 41 U.S.L.W. 4451.

The Arapahoe and Shoshone Tribes are very important organizations which exercise a broad tribal authority over their members. They also exercise authority as would owners of large tracts of land. Their membership is limited to persons of a certain parentage or lineage as determined from time to time by the respective Tribes or by custom. Others are excluded. The membership can be described as voluntary, and

the record indicates that a person with at least twenty-five per cent Arapahoe blood could be enrolled as a member of such Tribe, and the same for the Shoshone Tribe.

The tribal members are citizens of the United States. It is difficult to see how such an association of citizens could exercise any degree of governmental authority or sovereignty over other citizens who do not belong, and who cannot participate in any way in the tribal organization. The situation is in no way comparable to a city, county, or special district under state laws. There cannot be such a separate "nation" of United States citizens within the boundaries of the United States which has any authority, other than as landowners, over individuals who are excluded as members.

The authority in the custom-usage sphere over members is, of course, another matter. The Government cites *Iron Crow* v. *Oglala Sioux Tribe,* 231 F. 2d 89 (8th Cir.), as authority for a general power to supervise business on the Reservation. We do not consider the case to so hold; instead it is authority for the assertion of tribal authority over members of the Tribe and this only.

The purported delegation of authority to the tribal officials contained in 18 U.S.C. § 1161 is therefore invalid. Congress cannot delegate its authority to a private, voluntary organization, which is obviously not a governmental agency, to regulate a business on privately owned lands, no matter where located. It is obvious that the authority of Congress under the Constitution to regulate commerce with Indian Tribes is broad, but it cannot encompass the relationships here concerned.

Under 18 U.S.C. § 1161, neither the lands in issue,

nor the defendants, were under or within the "jurisdiction" of the Tribes.

The judgment is set aside and the case is REVERSED with instructions to dismiss each of the informations.

APPENDIX B1

September Term—November 8, 1973

No. 73-1077

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARTIN DEWALT MAZURIE, DEFENDANT-APPELLANT

Before Honorable DAVID T. LEWIS, Chief Judge, Honorable OLIVER SETH, Honorable WILLIAM J. HOLLOWAY, JR., Circuit Judges

Shoshone and Arapahoe Tribes of the Wind River Indian Reservation Amicus Curiae

This cause came on to be heard on the record on appeal from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof IT IS ORDERED that the judgment of the United States District Court for the District of Wyoming is set aside and the case is reversed with instructions to dismiss the information in accordance with the opinion of this Court.

HOWARD K. PHILLIPS,
Clerk.

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APPENDIX B2

September Term—November 8, 1973

No. 73-1078

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARGARET J. MAZURIE, DEFENDANT-APPELLANT

Before Honorable DAVID T. LEWIS, Chief Judge, Honorable OLIVER SETH, Honorable WILLIAM J. HOLLOWAY, JR., Circuit Judges

Shoshone and Arapahoe Tribes of the Wind River Indian Reservation Amicus Curiae

This cause came on to be heard on the record on appeal from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof IT IS ORDERED that the judgment of the United States District Court for the District of Wyoming is set aside and the case is reversed with instructions to dismiss the information in accordance with the opinion of this Court.

HOWARD K. PHILLIPS,
Clerk.

APPENDIX B3

September Term—November 8, 1973

No. 73-1079

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THE BLUE BULL, INC., A CORPORATION, DEFENDANT-APPELLANT

Before Honorable DAVID T. LEWIS, Chief Judge, Honorable OLIVER SETH, Honorable WILLIAM J. HOLLOWAY, JR., Circuit Judges

Shoshone and Arapahoe Tribes of the Wind River Indian Reservation Amicus Curiae

This cause came on to be heard on the record on appeal from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof IT IS ORDERED that the judgment of the United States District Court for the District of Wyoming is set aside and the case is reversed with instructions to dismiss the information in accordance with the opinion of this Court.

HOWARD K. PHILLIPS,
Clerk.

APPENDIX C

[Filed November 22, 1972, A. Marvin Helart, Clerk]

In the United States District Court For the District of Wyoming

No. 8570, Criminal

UNITED STATES OF AMERICA, PLAINTIFF

vs.

MARTIN DEWALT MAZURIE, MARGARET J. MAZURIE, THE BLUE BULL, INC., A CORPORATION, AND BONNIE ELLEN VELASQUEZ, DEFENDANTS

Judgment of Conviction With General Findings

The above entitled matter having come on regularly for trial before the Court, without a jury, such being properly waived by all parties, plaintiff appearing by and through its attorney Richard V. Thomas, United States Attorney for the District of Wyoming, and defendants Martin Dewalt Mazurie, Margaret J. Mazurie and The Blue Bull, Inc., appearing by and through their attorney, Charles E. Hamilton, and defendant Bonnie Ellen Velasquez appearing by and through her attorney, John R. Hursh. The Court having heard all the evidence presented took the matter under advisement, and after having carefully reviewed the pleadings, exhibits, memoranda and all other material on file herein, and being fully advised in the premises, the Court makes the following general Findings:

FINDINGS

1. This is a criminal action in which defendants are charged with unlawfully, wilfully and knowingly introduce into Indian Country malt and spirituous and vinous liquor and beer, ale and wine and ardent and intoxicating liquors in violation of Title 18 U.S.C. Sections 1154 and 2.

2. The defendant Bonnie Ellen Velasquez was acquitted of the charge against her, and judgment was entered to that effect on October 13, 1972.

3. The defendants Martin Dewalt Mazurie and Margaret J. Mazurie owned and operated the Blue Bull, Inc., a corporation, within the exterior boundaries of the Wind River Indian Reservation. The Blue Bull, Inc., engaged in the sale of intoxicating beverages.

4. The said defendants and Blue Bull, Inc., were operating under a valid retail liquor license issued by the County Commissioners of Fremont County, Wyoming.

5. That both the Arapahoe General Council and the Shoshone General Council adopted, and passed Ordinance No. 26 during the month of February 1971.

6. Ordinance No. 26 prohibited the sale of intoxicating beverages within the "Indian Country" under the jurisdiction of the Tribes unless a license was first obtained from the Tribes.

7. The said defendants filed an application with the Joint Business Council of the Shoshone and Arapahoe Tribes for a license to sell intoxicating beverages on April 12, 1972, and thereafter the Joint Business Council denied said application.

8. The said defendants continued to sell intoxicating beverages at the Blue Bull, Inc., after their application for an Indian license was denied.

9. The Blue Bull, Inc., was located in the exterior boundaries of the Wind River Indian Reservation, on land owned by the Blue Bull, Inc, in fee.

10. The Blue Bull, Inc., is situated approximately two and one-half miles from the Public School on the Reservation at a site known as Fort Washakie, Wyoming.

11. That Fort Washakie is not an incorporated non-Indian community with recognized boundaries.

12. That on June 10, 1972, an enrolled Shoshone Indian, who resided near Fort Washakie, purchased a six pack of beer from Martin Mazurie at the Blue Bull bar.

13. That the Court has jurisdiction of the parties and the subject matter of this action.

14. The area known as Indian Country is defined by Title 18 U.S.C. § 1151.

15. Title 18 U.S.C. Section 1161, provides as follows:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country *provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.* [Emphasis supplied.]

16. The federal government retains jurisdiction over deeded land to non-Indians in fee which is located within the exterior boundaries of an Indian reservation. See *Seymour* v. *Superintendent,* 368 U.S. 351 (1962), *Beardslee* v. *United States,* 387 F. 2d 280 (8th

Cir. 1967), and *Hilderbrand* v. *Taylor,* 327 F. 2d 205 (10th Cir. 1964).

17. This Court therefore holds that although said defendants operated the Blue Bull, Inc., on land deeded to them in fee, such land is in Indian Country and therefore subject to federal law.

18. The provisions of 18 U.S.C. 1154, prohibiting the sale of intoxicants in Indian Country does not apply when the sale of intoxicants is in conformity both with the laws of the State where the Indian Country is located and with an ordinance" * * * duly adopted by the tribe having jurisdiction over such area of Indian Country, certified by the Secretary of Interior, and published in the Federal Register". 18 U.S.C. § 1161.

19. Ordinance No. 26 as adopted by the Shoshone and Arapahoe Tribes is in complete compliance with 18 U.S.C. § 1161.

20. Although the said defendants were distributing intoxicants pursuant to a valid state retail liquor license, they were doing so in Indian Country without a license issued by the Joint Business Council of the Shoshone and Arapahoe Tribes in violation of Ordinance No. 26.

21. The said defendants in dispensing intoxicants from the Blue Bull, Inc., absent a license from the Joint Business Council of the Shoshone and Arapahoe Tribes violated Section 1154 of Title 18, U.S.C.

The Court, after having heard all the evidence and considered all facts and circumstances of the case, including the federal statutes applicable to Indian Country finds that the United States has proven the defendants Martin Dewalt Mazurie, Margaret J. Mazurie and the Blue Bull, Inc., a corporation, guilty beyond a reasonable doubt. It is therefore

ORDERED that the said defendants be, and they are hereby, found guilty on Count 1 of the information filed herein.

Dated this 22nd day of November, 1972.

IRVING R. KERR,
Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1973